On Burger and Fortas, Pps. 2-3

Barely Out Of One Mess, Why Look For Others?

"When our forces are no longer needed in South Vietnam, we shall not abandon in peace what we have fought for in war — the peaceful evolution of Southeast Asia."
Secretary of State Rogers to SEATO at Bangkok, May 20.

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Same Old Formulas, Same Tired Rhetoric

In an exchange of toasts at the White House last month, the Australian Prime Minister drew an implied comparison between Lincoln and Nixon. Walt Rostow, too, used to get Lyndon Johnson's juices flowing in the morning by telling him he was just like Lincoln. The Australian got so carried away that he ended up by demonstrating his native talent with the boomerang. If Lincoln had not persevered against the Copperheads and the Horace Greeleys, Mr. Gorton explained, there would today be "a slave autocracy in the South . . . But there would have been no United States." Since Lincoln and the North were trying to reunite the country by force of arms ("aggression") against the wishes of the Southern states for independence ("self-determination"), Mr. Gorton's flattery was clearly beginning to rebound. The more he went on the more it sounded like a toast to Ho Chi Minh.

If John Brown Had Succeeded

Mr. Gorton's analogy invites elaboration. If John Brown had succeeded in raising a slave revolt, if the North had helped the rebels, and if England had intervened on the side of the slaveholders (as the Tories later wanted to), the situation would have been comparable to the Vietnamese war. Suppose further that England, tired of a costly distant conflict, had proposed that all "non-Southern" forces withdraw, thus putting Lincoln's Unionist armies in the same "foreign" category as Britain's. Suppose the slaves were asked to lay down their arms while the slaveholders kept their army intact, and trust to "free elections" under a vague promise of international supervision but with the slaveholder regime still in power. Suppose that regime in Richmond were filling the jails with spokesmen for poor white, non-slaveholding and pro-peace elements while Britain — heavily arming this regime in preparation for its own troop withdrawal — piously insisted that its only purpose was to give the South the right of self-determination. That is where Nixon stands today.

For those who wonder just what Nixon was up to in his May 14 peace proposals, the Nixon-Gorton visit offers another source of illumination. Except for New Zealand, with its 150 token soldiers, Australia is the only white country which has put troops beside our own in the effort to revive the White Man's Burden in Asia. The war is almost as unpopular in Australia as here, and Gorton's opposition — the Labor Party — led the protest demonstrations which greeted Ky two years ago in Australia. The conservative coalition Gorton heads was Johnson's faithful junior partner. Gorton was here only a week before Nixon's Vietnam speech. If Nixon were contemplating any real departure in policy, he would be leaving Gorton out on a limb. It would be necessary to prepare Australian public opinion. But nothing in their exchanges reflected any change in policy; they spoke as simple-mindedly as Johnson of their joint effort "to help South Vietnam preserve its independence."

Hard To Tell Apart

"If we simply abandoned our effort in Vietnam, the cause of peace might not survive the damage that would be done to other nations' confidence in our reliability . . . it would enormously increase the danger of a bigger war later."
—Nixon on Vietnam, May 14.

"From Berlin to Thailand are people whose well-being rests, in part, on the belief that they can count on us if they are attacked. To leave Vietnam to its fate would shake the confidence of all these people in the value of an American commitment . . . The result would be . . . even wider war."
—Johnson at Johns Hopkins, April 7, 1965.

"We have also ruled out . . . acceptance of terms that would amount to a disguised American defeat."
—Nixon on Vietnam, May 14.

"We will not withdraw . . . under the cloak of a meaningless agreement."
—Johnson at Johns Hopkins, April 7, 1965.

Those who are working themselves into euphoria by wishful exegesis of what Nixon did *not* say in his May 14 address would be wise to pause a moment over what Nixon and Gorton did not say in their exchanges a week earlier. These, as expected, attracted little attention in this country, and did not have to take American peace sentiment into account.* The Nixon farewell statement, which Gorton said was framed with his agreement and served as a final communique, spoke of their talks on "Vietnam and regional security." A continued U.S.-Australian protectorate over Southeast Asia was implied. Nixon welcomed, and promised to support, Australia's decision to keep troops in Malaysia and Singapore when the British leave two years hence, forever ending the Kipling era east of Suez. But not a single word was said about the negotiations in Paris, or the hope of a turn toward peace.

Nixon like Johnson is playing for time. His May 14 address strongly recalls Johnson's at Johns Hopkins in April

(Continued on Page Four)

***Indeed the only place the texts are available is in the Weekly Compilation of Presidential Documents for May 19.**

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No "Strict Constructionist" When It Comes to First Amendment Rights

A Perfect Chief Justice for A Mediocre and Repressive Nixon Era

At an informal press conference to explain how he picked Warren Burger as Chief Justice, President Nixon was asked what jurists he admired. He named Holmes, Brandeis, Cardozo and Frankfurter. There is faint resemblance between them and the men to whom Nixon says he first offered the Chief Justiceship: Justice Stewart, Attorney General Mitchell, former Attorney General Brownell and Tom Dewey. The last three are Nixon cronies and mediocrities with more vulgar bias than legal learning. Brownell is remembered for his unprincipled "twenty years of treason" charge against the Democrats when he was Attorney General.

"Faceless Informers" Didn't Bother Burger

If Nixon has any real conception of what Holmes and Brandeis stood for, he is certainly making sure that he does not pick anyone remotely like them for Chief Justice. His fifth and final choice, Judge Warren Burger, is as undistinguished as the rest. There have been conservatives of learning and humanity on the Court; Mr. Justice Harlan is an example. But Nixon's choices are not on that level. The circumstances which first brought Burger to public attention are indicative. When Solicitor General Simon E. Sobeloff refused back in the haunted Fifties to sign the government's brief in the Peters loyalty case because it rested on the use of "faceless informers", Burger then in the Justice Department stepped forward to argue (and lose) the case against Thurman Arnold and Abe Fortas. In 1956 Eisenhower named both Sobeloff and Burger to the Court of Appeals, the latter in the District of Columbia.

The Court of Appeals in the District of Columbia is unusual in that it deals like a State appellate court with a wide range of criminal cases. Under Chief Judge Bazelon, and before him Edgerton, it has distinguished itself by its liberalism, by its concern for the rights of the poor and ignorant and by its pioneer rulings in the field of insanity. Burger has consistently dissented from all that was good and humane in that record. And unlike Judge Friendly in New York, who shares the same biases, Burger has done so with little learning or distinction.

Our Other and Nearer Moonscape

Mr. ANDREWS (D-Ala.): Why has the flying hour program increased so drastically when we have ceased bombing North Vietnam?

Gen. D. L. CROW (Budget Dir. Air Force): The biggest single increase has been in the B-52s and their supporting KC-135s [refueling planes] . . . increasing the B-52 sortie rate first from 1200 to 1400, subsequently to 1600 and currently to 1800 [per month].

Mr. ANDREWS: I am wondering how much longer South Vietnam can stand up under these bombardments from B-52s . . . Do these bombs make craters?

Gen. CROW: The best description of that terrain after the B-52 bombardments is that it looked like the surface of the moon.

Mr. ANDREWS: You say we have already used more bombs than we did in World War II, in a relatively small country. I wonder how it is going to look when we get through over there. Will it be habitable?

—p. 296 House Appropriations hearings on the 1969 2d supplemental. Released May 17. Gen. Crow testified (p. 295) it now costs $446 an hour for fuel alone to fly a B-52.

His latest reversal (April 21) by the Supreme Court was for an over-wrought and pompous decision upholding the conviction of Robert Watts, a young black, for "threatening the life of the President" by a silly remark an Army counter-intelligence spy overheard. The Supreme Court reversed without hearing argument. It held that the remark was no more than "political hyperbole." Justice Douglas wrote an amusing concurring opinion on the history of such prosecutions in the earlier English common law.

Nixon in the campaign said he wanted Judges who would be "strict constructionists." In political controversy this has usually come to mean men who will construe the constitution strictly *or* loosely against the rights of man and for the rights of property. The Watts case is a warning that the new Chief Justice, unlike Holmes and Brandeis, will not construe the First Amendment strictly where free speech is concerned. He promises to be the perfect Chief Justice for a mediocre and repressive Nixon era.

Secret And Censored Testimony Indicates Army Plans No Withdrawal In Vietnam

Mr. ANDREWS (D. Ala.): When you projected your 1969 budget, how many did you budget for Southeast Asia?

Gen. L. B. TAYLOR (Dir. Army Budget): We had planned on an Army end-strength in Vietnam of [censored].

Mr. ANDREWS: That increase is 17,400 over the figure which you mentioned several times in your statement?

Gen. TAYLOR: That is correct, sir.

Mr. ANDREWS: Were those 17,400 sent there as replacements or sent there to add to the [censored]?

Gen. TAYLOR: They were additive.

Mr. ANDREWS: Do you have any plans to send any more there in the near future?

Gen. TAYLOR: I think it goes up approximately [censored] in the next fiscal year, Mr. Chairman.

Mr. ANDREWS: We are still having a buildup there as far as the Army is concerned?

Gen. TAYLOR: Yes sir; to reach approved program strength figures.

Mr. ANDREWS: Are you familiar with any plans to withdraw any of our troops from there?

Gen. TAYLOR: No, sir. I am not familiar with any such plans.

Mr. ANDREWS: In your 1970 budget you ask for an end strength of [censored]. Is that correct?

Gen. TAYLOR: That is correct, sir.

Mr. ANDREWS: This does not look as if you plan withdrawal. It looks as if you plan an increase.

Gen. TAYLOR: [Censored].

Mr. LIPSCOMB (R. Cal.): You said we will have an increase to reach your program strength. That is not the only reason, is it?

Gen. TAYLOR: No sir.

Mr. LIPSCOMB: That is the way it sounds.

Gen. TAYLOR: I am sorry if I misled you, sir. These strengths have been approved as required to support the strategic concepts developed for Vietnam.

—Testimony taken in executive session March 6 by House Appropriations on the 2d Supplemental for 1969 and released May 17. Slightly abridged here. Pps. 360-1.

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Fortas Was Unctuous and Disingenuous In Explaining His Resignation

The Whole Truth About Wolfson and Fortas Has Yet To Be Told

It is "a high misdemeanor" for a judge to engage in the practice of law. The troublesome new revelation in Fortas's resignation as a Supreme Court Justice is that the convicted financier Wolfson "on occasion would send me material relating to his problems . . . and on several occasions he mentioned them to me." This, by Fortas's own admission, was after he became a Justice. What did Fortas do when he received this "material" and when Wolfson "mentioned" his "problems"? Did Fortas send the materials back, did he stand mute? Did he refuse to enter into any correspondence or discussion about them on the grounds that giving Wolfson legal advice of any kind would be improper, perhaps unlawful? The question is not answered by the Fortas memorandum to Chief Justice Warren. Fortas says only that "I have not *interceded* or *taken part* [italics added] in any legal, administrative or judicial matter affecting Mr. Wolfson or anyone associated with him." But Fortas does not say whether on occasion he gave Wolfson advice on how to handle his "problems."

A Belated Candor

What makes this revelation more damaging is that it came only, like Fortas's resignation, after he learned that Wolfson had talked to the FBI in prison. This may also account for Fortas's belated revelation that the $20,000 he received from Wolfson's foundation was not intended to be a single payment but a lifetime retainer, payable after Fortas's death to his wife. It is impossible to believe that as slick an operator as Wolfson entered into any such relationship in the belief that all he would get was some advice for his Foundation's rather skimpy philanthropic activities.

The Fortas memorandum, like his testimony in the fight against his nomination as Chief Justice, is far from being the whole truth. A stock promoter in trouble with the government uses his "foundation" to put a Supreme Court Justice secretly on his payroll for life at $20,000 a year, and the recipient, after the first payment comes to light, sees no conflict with his judicial duties! That is pretty disingenuous. So is Fortas's claim that he took this retainer because he thought "the work of the court would leave me adequate time" for "the foundation assignments!" This treats the whole affair as a bit of moonlighting.

Fortas admits that he cancelled the retainership in June, 1966, after learning that the SEC had sent the Wolfson file to the Justice Department for criminal prosecution. It is curious that Fortas does not claim that he did so because the prospect of such prosecution might embarrass him as a Supreme Court Justice. He says his letter cited only "the burden of court work." Even then the arrangement was cancelled "subject to completing the projects for the year." What projects? He does not say. Apparently he intended to serve out the year and keep the first $20,000 annual payment. But in December he decided "because of the developments which had taken place" that "the services which I had performed should be treated as a contribution" and he sent back the $20,000. What "developments"? The indictments of Wolfson?

In an interview with Benjamin J. Bradlee, executive editor of the *Washington Post* (May 16), right after his resignation, Fortas said of his returning the money in December rather than June "I really delayed there just as an act of humanity!" The interview was extraordinary in its brass or *chutzpah*. To believe Fortas, he resigned only to save the Court from "a constitutional confrontation." He told Bradlee, "Hell, I feel there wasn't any choice for a man of conscience." He bowed out "not because the Court had any jurisdiction or any power in the matter, but because the Court is a sacred institution." Worse than the imprudence, and even the cupidity, is the cant.

50-40, Oil Subsidies Or Fight!

"Mr. LONG (D-La.): The reason we have the oil import control program is not to try to get oil cheaper. The reason we have the program is that we feel we should be able to provide for our requirements of an item that is absolutely essential to this nation. The Senator [Proxmire] talks about Canadian oil being available. How does the Senator know whether a war would not break out between the United States and Canada? Has the Senator ever heard of the War of 1812?" *—Debate in the Senate (abr.), Apr. 15, S 3742.*

A "Credible Diplomacy" Involves More Than Megatonnage And Nuclear "Chicken"

"I would remind the press corps, I am here at a time when the United States faces a threat, not of the magnitude that President Kennedy faced at the time of the Cuban missile crisis . . . at that time all of the professional experts agreed that the U.S. superiority was at least 4 to 1 and maybe 5 to 1, over the Soviet Union in terms of overall nuclear capability . . . I do not want to see an American President in the future, in the event of any crisis, have his diplomatic credibility be so impaired because the United States was in a second-class or inferior position. We saw what it meant to the Soviets when they were second. I don't want that position to be the United States' in the event of a future diplomatic crisis."

—Nixon at press conference, April 21.

"I am very much troubled by the argument that the Safeguard system, by protecting the deterrent force, would strengthen the President's resolve in a crisis . . . It would be most unwise to build it just to back up a game of 'chicken.' The strategic superiority enjoyed by the United States is often cited as the reason for the Soviet withdrawal during the Cuban missile crisis and used to support this argument. I believe that geography and disparity of interests were much more important than relative nuclear strengths. It was easy for the United States to bring its conventional forces to bear on that situation and extremely difficult for the USSR to do so. Strategically, it was much more important to the United States than to the Soviet Union. Recall that the United States had absolute nuclear superiority at the time of the 1948 Berlin crisis, but this helped very little in resolving that crisis. The United States also had vast nuclear superiority at the time of the suppression of the Hungarians by the Soviet Union, and yet it could not affect the outcome because the Soviet forces were much nearer and the question of who controlled the area was much more vital to the Soviet leaders."

—Dr. Jerome Wiesner to Gore Subcommittee, May 14.

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A High Road for Nixon and A Low Road for Thieu

(Continued from Page One)

1965. Johnson deluded many people into believing that he was moving toward peace at the very moment he was committing the first U.S. combat troops to the South. The only remarkable thing about the Nixon address is that at one point he seemed to be pulling his own leg. When Nixon said "repeating the old formulas and the tired rhetoric of the past is not enough," he seemed to be setting himself up for the cartoonists. If I were running the Secret Service I would find out who wrote that and take him down to the White House cellar for interrogation under the bright lights. For as Senator Gore showed in a devastating analysis on the Senate floor May 20, the speech was full of old formulas and tired rhetoric picked up almost verbatim from Johnson and Rusk. Even Nixon's titillating hints about free elections and a neutral South Vietnam were also uttered, as Gore found, in almost the same words by Rusk in 1966. The parallels with Johnson (see box on p. 1) sound as if Nixon was down on the ranch. If this weren't politics, it would be plagiarism.

Many Hints But Little Substance

The speech is so tricky it has everybody confused except Henry Kissinger. "Proponents leak stories that the President is sending subtle signals to the Reds that he'd let them share in a new Saigon government as part of a peace package," the *Wall St. Journal* said May 23. "Opponents warn this would bring the 'disguised defeat' Nixon had vowed not to accept. White House aides insist no decision has been made." Never have there been so many hints with so little substance.

You can read in Chalmers Roberts in the *Washington Post* (May 18) that silence gives consent and that what Nixon didn't say May 14 really means he is ready to accept even an interim coalition government. This was "spelled out by persons in a position to know," Roberts wrote ecstatically. But gravitation being what it is, what goes up must come down, and he added a *but* — "The U.S. cannot accept settlement terms which would turn the South over to the Communists and make a mockery of the years of American and South Vietnamese bloodletting." The only sure non-mockery, it would seem, is to maintain in power the same oligarchy we have imposed on the South for 15 years.

The Noblest Kennedy Memorial

We salute with respect and sympathy Senator Kennedy's letter asking that Sirhan's life be spared. It was the noblest memorial to Robert Kennedy and to President Kennedy. No family has suffered more terribly from insanely unbridled political passion and none has set a more truly Christian example than in the case of this poor Palestinian Arab demented by his people's suffering. Our times are sick of blood and bloodshed.

On the other hand you may read in David Lawrence (May 21) that the Nixon Administration has "at last" decided that it will not tolerate the continuance of heavy attacks and is not ruling out drastic reprisals which "could mean the resumption at any moment of the bombing of North Vietnam and even a blockade of Haiphong harbor." Obviously the White House is handing out different lines of poop. Richard Wilson (*Washington Star*, May 21) reports jubilantly that before Nixon went on TV May 14 he gave an extemporaneous resume to his top-level officials. They not only applauded but "there was no doubt what they were applauding." The main emphasis was on "not quitting" and on Nixon's "unpleasant options" if Hanoi does not accept mutual withdrawal. These include "a massive fire-bomb raid to destroy Hanoi." We'll put 'em back in the Stone Age yet. Senator Hugh Scott, the G.O.P. whip, dropped hints of the same kind after Senator Kennedy — in the wake of "Hamburger Hill" — attacked the bloody nonsense of charging up any hill a well dug-in enemy baits for U.S. attack.

In the blizzard of hints, there is also a preview of what Nixon may say to Thieu on Midway June 8. It is hinted that if one reads the fine print closely one will see that Saigon holds a secure veto over the international supervisory body to verify withdrawals "and for any other purpose *agreed upon* between the two sides." The elections, too, would be held under "agreed procedures" and agreed means the agreement of the Thieu regime. While Nixon takes the high road, Thieu will have the low, and when domestic opinion gets tired of seeing the Reds reject Nixon's "generous" offers, the iron will be hot and the Pentagon hopes it can strike again.

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